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No. 154

In the Supreme Court of the United States

OCTOBER TERM, 1958

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, PETITIONER

v.

THE REPUBLIC OF CHINA, CHINA MERCHANTS STEAM NAVIGATION COMPANY, LIMITED, AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
GEORGE COCHRAN DOUB,
Assistant Attorney General,
SAMUEL D. SLADE,
WILLIAM A. KLEIN,
Attorneys,
Department of Justice, Washington 25, D. C.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland (R.[1] 4–54) is reported at 151 F. Supp. 211. The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. A1–A19) is reported at 254 F. 2d 177.

JURISDICTION

The judgment of the Court of Appeals was entered on April 8, 1958. The petition for a writ of certiorari

[1] "R." refers to petitioner's appendix in the Court of Appeals.

was filed on July 5, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the actions of the masters and crews in taking control of certain ships owned by the Chinese Nationalist Government and holding them for the Chinese Communist Government constituted "barratry" rather than "seizure" as those terms were used in the insurance contracts covering those vessels.

STATEMENT

This action consolidates seven suits in admiralty brought to recover the proceeds of marine insurance for the value of seven ships which had been sold, subject to mortgages, by the United States to the Nationalist Government of China, and subsequently lost by the defection of their masters, officers, and crews (Pet. App. A1). Before their loss, the ships had been operated by the respondent China Merchants Steam Navigation Company (CMSN), a governmental corporation of the respondent Republic of China (Nationalist Government). The insurance contract covered losses due to "barratry of the masters and mariners" or to the "consequences of civil war," but excluded losses resulting from "capture and seizure." The District Court held that six of the ships were lost by "barratry" and the seventh by "seizure." (Pet. App. A2.) The Court of Appeals held that the loss of all seven ships was the result of "barratry."

The facts of the case, fully developed in the opinions of both courts below, may be summarized as follows:

Historical background

After World War II, communist armies dominated northern China, and in 1949 drove southward. By December 9, 1949, the mainland was largely in control of the communist forces, and the Nationalist Government had been forced to withdraw to the Chinese province of Taiwan, where it established its capital at Taipei. Since that time it has continued to operate on Taiwan as a sovereign entity. It is recognized by the United States as the only proper and lawful government of China and its officials are the accredited representatives of the Republic of China in the United Nations. (Pet. App. A3.) The British Government, as of midnight January 5 6, 1950, recognized the Communist Government as the de jure government of the Chinese mainland, at the same time withdrawing recognition of the Nationalist Government as a de jure government (Pet. App. A4).

The ships

The seven ships involved in this case were sold in 1946 and 1947 to "the Government of the Republic of China" (the Nationalist Government's official title) by the United States, subject to preferred ship mortgages securing the unpaid balance of the purchase price. As a result of defaults occurring in October 1949, the United States acquired the right to retake the vessels. (Pet. App. A2–A3.)

After the ships were acquired they were operated through a Nationalist Government agency, which, in September, 1948, was organized as a government-owned corporation called the China Merchants Steam

Navigation Company, Ltd. (CMSN). Its main office is in Taipei, with a branch office at Hong Kong. Petitioner recognized CMSN as the Nationalist Government's representative and transacted insurance business relating to the seven ships through that agency. The port of registry of each ship has been, since the latter part of 1949, a port on Taiwan. (Pet. App. A4.)

The insurance

The insurance policies covering the seven ships were issued in the names of "the Government of the Republic of China represented by Universal Trading Corp." on various dates in 1949, for amounts ranging from $342,375 to $550,000. Losses were payable to the United States for distribution to itself and the Nationalist Government as the interest of each might appear. (Pet. App. A4–A5.) Petitioners knew that the head office of CMSN had been transferred to Taipei and, of course, were aware of the civil war in China and of the competing interests involved in that conflict (R. 9, 29).

The insurance contract contained marine-risk and war-risk coverage.[2] Marine-risk coverage insures against losses resulting from, *inter alia*, "Barratry of

[2] In this case the term "contract" is used in a general sense to describe a hodge-podge of policies, warranties, and riders, the construction of which "requires a skill not unlike that called for in the decipherment of obscure palimpsest texts." See *Calmar S. S. Corp.* v. *Scott*, 345 U. S. 427, 432. For the sake of descriptiveness and simplicity we refer to "marine-risk coverage" and "war-risk coverage" under the all-encompassing "insurance contract." The jargon of marine insurance, however, describes these coverages as the "marine-risk policy" and the "war-risk policy."

the Master and Mariners," but excludes losses "resulting from capture, seizure, arrest, * * * all consequences of hostilities," etc. (Pet. App. A5, R. 239–41). The war-risk coverage is expressly designed to provide for those warlike risks excluded from marine-risk coverage, including the "consequences of civil war" (Pet. App. A5, R. 241–42). However, the war-risk coverage in this case was limited by the typewritten clause: "Excluding Capture and Seizure" (Pet. App. A5, R. 242). Originally, the policies did not contain this exclusion but instead limited the ports in China at which the ships could touch, so as to avoid the danger of capture by the communist forces. But with the increasing scope of Communist control in 1949, the area limitation proved inadequate and the clause "excluding capture and seizure" was added, for the obvious purpose of excluding from coverage the risk of capture by the communist forces. (Pet. App. A5.)

The loss of the ships

A. The Hong Kong vessels

Six of the ships in this case were moored in Hong Kong harbor when the events here involved occurred, and have been referred to by both courts below as the Hong Kong vessels.

Beginning on November 13, 1949, with the communist threat becoming more and more imminent, the CMSN general manager at Taipei sent frequent messages to the Hong Kong branch office and to the officers and crews of the ships, ordering the ships to proceed to Taiwan or other designated ports (Pet. App. A6). The ships' personnel, who had been dis-

cussing among themselves the question of what course to follow, ignored these orders because, for various reasons, they were inclined to avoid alliance with the nationalist cause in view of the existing state of affairs (Pet. App. A6, R. 13–14). The head office continued to provide money for wages and supplies, and offered certain inducements to return to Taiwan (Pet. App. A6, R. 14–15). On January 13, 1950, the manager and most of the employees of the CMSN branch office at Hong Kong publicly defected to the Communist Government. The main office, however, remained loyal to the Nationalist Government and there was nothing to prevent the ships from leaving the harbor other than the unwillingness of the masters and mariners to obey the orders of the main office. Two nationalist ships other than the six did sail to Taiwan. (Pet. App. A6.) Communist artillery dominated Hong Kong harbor but the Communist Government did not, by proclamation or otherwise, purport to take over CMSN or any ships in foreign ports (Pet. App. A6–A7).

On January 16, 1950, the master of each ship raised the flag of the Communist Government, without opposition by the crew. The personnel of the Hong Kong CMSN office, having already defected, had purported to give orders that the flags be changed, but it is clear that the actions of the masters in doing so were not inspired by this order; the masters had previously reached an agreement among themselves to follow this course. The action of each master was the result of "his own deliberate decision." (R. 16.) Immediately after the defection, the United States, the Na-

tionalist Government, and CMSN made every reasonable effort to recover possession of the ships, but these efforts proved unavailing (R. 20–22).

B. The Hai Hsuan

The Hai Hsuan was on the Indian Ocean en route to Japan at the time of the British recognition of the Communist Government and at the time of the defections in Hong Kong (Pet. App. A7, R. 16–17). These events became known to the ship's company through British radio broadcasts. The master received radio messages from the CMSN main office at Taipei ordering him to avoid all British ports and to proceed directly to Taiwan. He was anxious to comply, but was opposed by the officers and crew, led by the chief engineer. (Pet. App. A7.) A radio message from the communist-controlled Hong Kong CMSN office purported to direct the ship to proceed to Singapore, and the officers and crew held a meeting to decide which orders to follow (Pet. App. A7). The master informed the gathering that only his orders should be obeyed, and left orders to proceed past Singapore without stopping (R. 17–18). However, when the ship was about 30 miles west of Singapore the engines were stopped by the crew. The master, several days without food and physically sick with fear, radioed the CMSN main office, stating that he was sick in bed and asking instructions (R. 18). In reply, the main office, unaware of the situation aboard the ship, instructed the chief officer to assume command and proceed to Taiwan. Instead he put into Singapore on January 24, and on January 26, with the master

in a hospital ashore, the communist flag was raised over the ship. As in the case of the six Hong Kong vessels, subsequent attempts to regain control of the ship proved unavailing. (Pet. App. A5.)

Proceedings below

The respondents, after demand for payments, sued for the proceeds of the insurance in the United States District Court for the District of Maryland. The District Court held, after trial, that respondents were entitled to recover for the loss of the six Hong Kong vessels, ruling that the circumstances relating to the loss of those vessels did not amount to a "seizure" (R. 44–45). However, recovery was denied in the case of the Hai Hsuan, on the ground that the circumstances relating to the loss of that ship did constitute a "seizure" (R. 45).

The Court of Appeals affirmed as to the six Hong Kong vessels. However, it reversed the judgment of the District Court in the case of the Hai Hsuan (Pet. App. A13–A14).

ARGUMENT

It is clear, as held by the court below, that the actions of the masters and crews of the ships involved in this case fall within the accepted definition of "barratry": *i. e.*, a breach of duty to the owners of a ship by its master or crew, regardless of motivation (see Pet. App. A8–A13). Equally clear is the understanding of underwriters of marine insurance that according to recognized authority "the word 'seizure' cannot be applied to any barratrous act of the master" or to the mutiny of the crew. See *Greene* v.

Pac. Mut. Ins. Co., 91 Mass. (9 Allen) 217, 221; Pet. App. A13.[3] Since the facts of this case fit so neatly into the well-settled definitions of what "barratry" is and what "seizure" is not, it is, of course, unnecessary to a decision of the case to define what "seizure" is. The cases cited by petitioner as being in conflict with the decision of the court below are demonstrably not in point. Finally, review by this Court of the decision below would not be appropriate because the prospective importance of that decision is limited by the unique facts of the case and because the effect of the decision may easily be nullified or avoided by the petitioner and other underwriters by a simple clarification of the typewritten exclusionary clause which gave rise to this dispute.

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[3] Both courts below considered that the sole question was whether this was a case of "barratry" (within its generally accepted meaning) or "seizure." Petitioner, however, now raises the argument that, within the context of this case, "barratry" has an unusual, limited meaning (Pet. 28-32). This argument is based upon a distinction between the marine-risk and the war-risk coverage. The former expressly includes "barratry"—obviously in its broad, generally accepted sense. The latter includes barratry only by implication, and thus, petitioner contends, limits the concept to warlike acts. But even if this purported distinction is one of substance, which we do not concede, it is a distinction of no significance for the purposes of deciding the present case. Both marine-risk and war-risk coverage were placed with the same company, as is customary, so as "to avoid the trouble some questions that arise so often when the two policies are issued by different insurers." (R. 10.) Even if the barratry contemplated under the war-risk coverage is a limited concept, the petitioner insurer remains liable, under the marine risk coverage, for "barratry" as that term is generally used. Thus it is obvious that there is no reason, in this case, to pass upon the distinction upon which petitioner places so

1. Well-established precedents have endowed the terms "barratry" and "seizure" with meanings which, without further elaboration, are dispositive of this case. The generally accepted definition of "barratry" is set forth at length, with supporting authorities, in the opinion of the District Court (R. 26–27), and is quoted in the opinion of the Court of Appeals (Pet. App. A8–A9). Briefly, "barratry" is defined as a breach of duty toward the owner of a ship by its master or crew, regardless of motivation. The actions of the masters of the six Hong Kong vessels and of the crew of the Hai Hsuan clearly fall within this definition. Thus, there remains only the question whether these actions might also be defined as "seizure." In answering this question it is, fortunately, unnecessary to offer a comprehensive explanation of what "seizure" is, because this case fits neatly into a well-settled rule as to what "seizure" is not. That rule was laid down in the venerable case of *Greene* v. *Pac. Mut. Ins. Co.*, 91 Mass. (9 Allen) 217. In that case the owner of a whaling ship recovered from the insurer for the loss of the ship resulting from the mutiny of the crew. The insurer defended on the ground that the mutinous actions of the crew, in wresting control from the officers by force and violence, constituted "seizure." In holding for the

much emphasis. It is true that the District Court observed, in dictum, that the losses in this case were covered by the war-risk clause, but it noted that "the question is important only because there were different re-insurers." (R. 46.) In other words, petitioner is asserting, as a reason for the granting of its petition, a potential conflict with re-insurers, who are not parties to this suit.

owner, the court reasoned that "the word 'seizure' cannot be applied to any barratrous act of the master" or to the mutiny of the crew, but that such conduct can only be described as "barratry." 91 Mass. (9 Allen) at 221. As both courts below pointed out, the *Greene* case has been repeatedly cited with approval by text writers in the United States. (See R. 39, 44; Pet. App. A13; 5 Appleman, *Insurance Law & Practice*, Sec. 3256, note 37, p. 400 (1941); 1 Parsons, *Law of Marine Insurance*, p. 584 (1868); 1 Phillips, *Insurance*, p. 652 (5th ed., 1867); *Richards On Insurance*, p. 834 (4th ed., 1932).) And as the Court of Appeals observed, the case "has become familiar knowledge to underwriters of marine insurance and their technical advisers." (Pet. App. A13; see also R. 44.) It establishes the rule that any act of a master or crew of a ship, in breach of the duty of both to the owner, constitutes "barratry" and cannot be deemed a "seizure." It must, of course, be presumed, generally, that parties to marine insurance contracts contemplate the applicability of this well-settled rule to their transactions. And in the present case there is certainly no evidence indicating any unusual understanding or intent of the parties with regard to these well-established precedents.[4]

Indeed, the circumstances of the case indicate that the addition of the clause, "excluding capture and seizure," was solely a response to the increasing possi-

[4] Any doubts as to this matter must, of course, be resolved against the insurer. *Calmar S. S. Corp. v. Scott*, 209 F. 2d 852, 856 (C. A. 2); *Marine Ins. Co. v. McLanahan*, 290 Fed. 685, 688 (C. A. 4).

bility, in 1949, of a physical taking of the ships by communist forces. This conclusion is based on the fact that this exclusionary clause supplemented successive provisions which relieved the insurer of liability for losses resulting from voyages to certain communist-controlled ports. As the communist area of conquest was extended, such area limitations did not keep up with events and thus proved inadequate. Accordingly, it became necessary to add the comprehensive clause, "excluding capture and seizure." In light of its background, the purpose of the exclusionary clause was, in the words of the Court of Appeals, "obviously to avoid capture by the communist forces" (Pet. App. A5), and not to relieve the insurer from losses resulting from the barratrous acts of the masters or crews.

2. The two English cases cited by petitioner (Pet. 33–38) as being in conflict with the decision in the instant case are not in point. *The Minden* (*Rickards* v. *Forestal Land, Timber and Railways Co., Ltd.*) [1942], A. C. 50, involved a German ship carrying British cargo at the beginning of World War II. Acting under orders of the German Government, the master attempted to take the ship and cargo to a German port and then scuttled it to prevent capture by the British. The House of Lords held that the insurance company was liable under a cargo policy insuring against loss resulting from, *inter alia*, seizure, and could not seek refuge under a certain exclusionary clause upon which it relied. The decision clearly deals only with the relationship of the master to the owner of the cargo, which differs markedly from his relationship to the owner of the ship. There was no

question of "barratry" in *The Minden* because "barrarty", by definition, can be committed only against the owner of a ship. Thus, although the case appears to state that a master can "seize" a cargo, there was certainly no occasion to pass upon the question decided by the instant case and by *Greene, viz.*, whether the *barratrous* acts of a master can constitute "seizure."

Cory v. *Burr*, 8 App. Cas. 393 (1883), is similarly inapposite. In that case the captain of a ship, in violation of his duty to the owners and in furtherance of his own interests, used the vessel in smuggling, which activity eventually resulted in a seizure by government authorities. The basic question considered was the proximate cause of the loss, which was held to be the government seizure rather than the master's barratry. But in the instant case there is no question of causation since, as the Court of Appeals noted, the loss "was brought about by the voluntary acts of the masters and crews in possession and was not compelled by the superior forces of the Communist Government." (Pet. App. A15.)

Petitioner also contends that the decision below conflicts with the principle enunciated by this court in *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, that "the rights of a sovereign state are vested in the state rather than in any particular government which may purport to represent it." 304 U. S. at 137. From this principle petitioner argues (Pet. 32–33) that the actions of the masters and crews in this case could not constitute "barratry" because ownership of the ships was vested in the Communist Government.

There are two separate answers to this argument. First, it is well settled, as this Court recognized in *Guaranty Trust*, that the State Department's recognition of a foreign government is conclusive in all courts in this country. Accord, *United States* v. *Pink*, 315 U. S. 203, 229–30. It follows that, in so far as our courts are concerned, the Nationalist Government is the only sovereign to which the masters and crews owed political allegiance, and that the Communist Government could not have acquired any legal rights to the ships.[5] Secondly, petitioner was well aware that the ships were owned by and registered in Taiwan in the name of the Nationalist Government, which was engaged in a civil war with the Communist Government. The policies were issued in the name of and premiums were accepted from the Nationalist Government. Petitioner cannot now be heard to say

[5] This observation disposes of possible conflict with *Guaranty Trust* v. *United States*, *supra*. However, petitioner incorporates in its argument from that case the additional suggestion—really a separate argument—that the six ships in Hong Kong harbor were subject to British law and that under this law the masters owed political allegiance to the Communist Government. But even if this were so, which we dispute, it would not follow that the masters' actions did not constitute "barratry," because, for the purposes of that concept, the crucial relationship is not citizen vis-à-vis sovereign but rather employee vis-à-vis employer. It is the violation of the duty of an employee which constituted "barratry" by the masters. That they were employees only of the Nationalist Government is beyond dispute. The voluntary termination of that relationship in such a manner as to cause the loss of the ships by the employer is, of course, a breach of duty constituting "barratry," regardless of whether it can realistically be said that the masters thereupon became "agents" of the Communist Government.

that the ships were not owned by the Nationalist Government. To do so is an attempt, in effect, to repudiate its contract.

3. Finally, this case does not present an issue which requires consideration by this Court. In the first place, the case turns upon the interpretation of language in an insurance contract, which language easily may be altered by petitioner and other underwriters so as to nullify or avoid the decision below or any decision which this Court might reach. The ease of effecting such an alteration is evidenced by the fact that the exclusionary clause which gave rise to the dispute in this case is itself a typewritten clause which the parties added to the usual printed contract. As the District Court so aptly noted (R. 42):

> If the insurer had feared the masters and mariners of the ships themselves, as well as the communist gunboats and port officials, and had wished to be free of the risk of defection by the masters and mariners, the insurer could have excluded barratry from the risks assumed, or could have inserted a clause clearly excluding a loss caused by the defection of masters or the mariners.

In addition, there is no need for clarification of the definitions of the words "barratry" and seizure." As we have indicated above (pp. 10 to 11), the meanings of those terms, at least for the purposes of this case, are well settled. The application of those definitions to the unique set of facts involved in this case does not merit further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.
GEORGE COCHRAN DOUB,
Assistant Attorney General.
SAMUEL D. SLADE,
WILLIAM A. KLEIN,
Attorneys.

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